

1 Thomas M. Smith  
2 Attorney for Defendant Automated Accounts, Inc.  
3 P.O. Box 1360  
4 Spokane, WA 99210  
5 Phone: 509-327-9902  
6 Fax: 509-327-6238  
7 email: tmlby@thomasmsmithattorney.com

8 UNITED STATES DISTRICT COURT  
9 EASTERN DISTRICT OF WASHINGTON

10 STARLA BRAHAM,

11 Plaintiff, NO. CV-10-385-EFS

12 vs.

13 AUTOMATED ACCOUNTS, INC., a  
14 Washington Corporation, and  
15 MICHELLE DOE and JOHN DOE,  
16 husband and wife, and the marital  
community comprised thereof,

Defendants.

DEFENDANTS' MEMORANDUM  
IN OPPOSITION TO PLAINTIFF'S  
MOTION FOR SUMMARY  
JUDGMENT ON DEFENDANTS'  
LIABILITY

17 I. INTRODUCTION

18 Plaintiff Starla Braham contends defendant Automated Accounts, Inc.  
19 ("Automated Accounts") misled her in violation of the Fair Debt Collection Practices  
20 Act ("FDCPA"). She claims this occurred when Automated Accounts truthfully told  
21 her it would being the process of legal action against her and, in response to Ms.  
22 Braham's question, explained this process included garnishment. With her summary  
23  
24

25 DEFENDANTS MEMORANDUM IN OPPOSITION TO  
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT  
PAGE 1

THOMAS MILBY SMITH, INC., P.S.  
ATTORNEY AT LAW  
P.O. Box 1360  
Spokane, WA 99210  
(509) 327-9902  
Fax: (509) 327-6238

1 judgment motion, Ms. Braham now claims defendants' statements violated the  
2 FDCPA as a matter of law. Not so. Defendants' statements were true, accurate, and  
3 not likely to mislead even the least sophisticated consumer into fearing imminent  
4 garnishment. Nonetheless, Ms. Braham insists she was deceived into believing her  
5 wages could be garnished at any moment. Defendants suggested no such thing.  
6 Indeed, defendants described their intended actions as beginning a "legal process,"  
7 explicitly acknowledging the time such action would take. As case law on the issue  
8 establishes, Ms. Braham's assumption to the contrary was not reasonable under even  
9 the "least sophisticated consumer" standard. Rather than granting summary judgment  
10 for plaintiff, this Court should rule as a matter of law that defendants committed no  
11 violation of the FDCPA.  
12  
13

## 14 II. FACTS

15  
16 Defendants have already presented the facts in papers filed with their own  
17 summary judgment motion.<sup>1</sup> Defendants have also filed a statement of facts in  
18 response to plaintiff's statement.<sup>2</sup> For brevity's sake, defendants will not repeat those  
19

20  
21 <sup>1</sup> See Defendants' Memorandum of Authorities in Support of Defendants' Motion for Summary Judgment and  
22 Defendants' Statement of Facts in Support of Defendants' Motion for Summary Judgment, both dated December 16,  
23 2011.

24 <sup>2</sup> See Defendants' Statement of Facts in Opposition to Plaintiff's Motion for Summary Judgment on Defendants'  
25 Liability, filed herewith.

1 accounts in their entirety. Ms. Braham's recitation of Ms. Bull's deposition  
2 testimony, however, omits facts that merit inclusion here.

3 Importantly, for purposes of her motion, Ms. Braham relies solely on the facts  
4 as stated by Ms. Bull. *See Memorandum in Support of Plaintiff's Motion for*  
5 *Summary Judgment on the Issue of Defendants' Liability Under 15 U.S.C. § 1692*  
6 *("Plaintiff's Memorandum")*, pp. 5-6. The following, therefore, relies chiefly on  
7 evidence offered by Ms. Bull.  
8

9 Ms. Bull spoke to Ms. Braham on November 2, 2009. *See Deposition of*  
10 *Michelle Bull ("Bull Dep.,")* 78:6-14.<sup>3</sup>; *see also Affidavit of Michelle Bull in Support*  
11 *of Defendants' Motion for Summary Judgment ("Bull Aff."),* dated December 16,  
12 2011. Ms. Bull advised Ms. Braham she was behind in the agreed-upon payments on  
13 her debt and advised Ms. Braham Automated Accounts would start its "legal process"  
14 to collect Ms. Braham's debt. *Bull Dep.*, 78:6-14; *Bull Aff.* Automated Accounts  
15 begins its legal process by requesting assignment of the consumer's debt. *Bull Dep.*,  
16 79:13-14. After speaking to Ms. Braham, Ms. Bull requested assignment of Ms.  
17 Braham's debt the same day she advised Ms. Braham she would begin the legal  
18 process—November 2, 2009. *Bull Dep.*, 79:15-24.  
19  
20  
21  
22

23 <sup>3</sup> Excerpts attached to Declaration of Thomas M. Smith in Support of Defendants' Motion for Summary Judgment  
24 ("Smith Decl."), filed December 16, 2011, as Exhibit B.

1 During their conversation on November 2, 2009, Ms. Braham asked Ms. Bull if  
2 garnishment was part of the legal process. *Bull Dep.*, 81:7-21; *Bull Aff.* Ms. Bull  
3 answered that she believed so. *Id.* Ms. Braham brought up the subject of  
4 garnishment--Ms. Bull did not. *Bull Dep.*, 100:20-24; *Bull Aff.* Ms. Bull never, at  
5 any time during the conversation, told Ms. Braham Automated Accounts was going  
6 to garnish Ms. Braham's wages. *Bull Dep.*, 101:21-102:4.

8 On November 2, 2009, after her last conversation with Ms. Bull, Ms. Braham  
9 called Ms. Bull's supervisor, Mario Ruiz, while visiting the home of her friend,  
10 Tamara Ramm. *Bull Dep.*, 15:20-21; *Affidavit of Mario Ruiz in Support of*  
11 *Defendants' Motion for Summary Judgment ("Ruiz Aff.")* filed December 16, 2011.  
12 As he spoke with Ms. Braham, Mr. Ruiz heard a loud male voice in the background  
13 telling her that Automated Accounts could not garnish her wages without obtaining a  
14 judgment first. *Ruiz Aff.* It was apparent to Mr. Ruiz that the man in the background  
15 on Ms. Braham's end of the conversation, whom Mr. Ruiz presumed to be Ms.  
16 Braham's husband, Larry Braham, was coaching Ms. Braham. *Ruiz Aff.* Mr. Ruiz  
17 heard the man say to Ms. Braham that she had been consistent in making her  
18 payments to Automated Accounts, that Automated Accounts had no right to mention  
19 garnishment without a judgment in place, and that Ms. Braham knew she had 90 days  
20 from any missed payment before legal action could commence against her. *Ruiz Aff.*

From what he heard, Mr. Ruiz believed Ms. Braham received correct information about when garnishment could occur on that date from the man speaking to her in the background. *Ruiz Aff.*

### III. ARGUMENT

Under Fed. R. Civ. P. 56(c), a court should grant summary judgment if no genuine issue of material fact exists. In considering such a motion, the court must construe all facts in favor of the non-moving party. *Mena v. City of Simi Valley*, 226 F.3d 1031, 1042 n.3 (9<sup>th</sup> Cir. 2000); *Frost v. Agnos*, 152 F.3d 1124, 1128 (9<sup>th</sup> Cir. 1998).

For purposes of her summary judgment motion, Ms. Braham relies solely on the facts as stated by Ms. Bull in her deposition. *See Memorandum in Support of Plaintiff's Motion for Summary Judgment on the Issue of Defendants' Liability Under 15 U.S.C. § 1692 ("Plaintiff's Memorandum")*, pp. 5-6. As the Court knows, defendants have made their own motion contending the Court should grant summary judgment in defendants' favor on all claims.<sup>4</sup> Relying on Ms. Bull's testimony and construing it in defendants' favor underscores the propriety of denying plaintiff's motion and granting defendants' motion.

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<sup>4</sup> See *Defendants' Motion for Summary Judgment* and supporting documents filed therewith.

**A. The Least Sophisticated Consumer Standard Is Objective and Presumes a Basic Level of Understanding and Reasonableness on the Part of the Debtor.**

Ms. Braham correctly notes that the “least sophisticated consumer” standard governs the issue of whether a defendant violated the FDCPA. Despite setting a low bar, however, this standard presumes a basic level of reasonableness on the debtor’s part.

The “least sophisticated debtor” standard is “lower than simply examining whether particular language would deceive or mislead a reasonable debtor.”...At the same time, the standard “preserv[es] a quotient of reasonableness and presum[es] a basic level of understanding and willingness to read with care.”...The FDCPA does not subject debt collectors to liability for “bizarre,” “idiosyncratic,” or “peculiar” misinterpretations.

*Gonzales v. Arrow Financial Services, LLC*, 660 F.3d 1055, 1061-62 (9<sup>th</sup> Cir. 2011) (citations omitted; emphasis added). Also, the standard is objective; it does not depend on the individual debtor’s subjective understanding. *Donohue v. Quick Collect, Inc.*, 592 F.3d 1027, 1033 (9<sup>th</sup> Cir. 2010). A court applying the standard asks whether a statement would likely deceive the “hypothetical” least sophisticated consumer. *Wade v. Regional Credit Association*, 87 F.3d 1098, 1100 (9<sup>th</sup> Cir. 1996) (affirming District Court’s rejection of FDCPA claim where written notice contained no false information). The question, therefore, is not whether Ms. Braham was actually deceived, but whether a hypothetical “least sophisticated consumer” would

be.<sup>5</sup> Under this standard, as a matter of law, defendants made no statements likely to mislead the least sophisticated consumer.<sup>6</sup>

**B. Defendants' Statements Were Not Likely to Deceive or Mislead the Least Sophisticated Consumer and Thus Did Not Violate 15 U.S.C. § 1692e(4), 1692e(5), or 1692e(10) as a Matter of Law.**

Section 1692e of the FDCPA prohibits a debt collector from making representations or threatening actions the debt collector a) cannot legally take and b) does not intend to take. *See* 15 U.S.C. § 1692e.<sup>7</sup> Conversely, a debt collector's

<sup>5</sup> Indeed, there is evidence Ms. Braham was not actually deceived. *See generally Ruiz Decl*, relevant portions cited above in "Facts" section..

<sup>6</sup> Plaintiff suggests defendants rely on the "literal truth" of their statements to Ms. Braham as a defense to her claims. *See Plaintiff's Memorandum, p. 14.* That is not true. While defendants do maintain their statements to plaintiff were true, the remainder of this memorandum demonstrates that defendants' statements were not only true, but were also not likely to mislead the least sophisticated consumer.

<sup>7</sup> The relevant subsections provide:

A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:...

(4) The representation or implication that nonpayment of any debt will result in the arrest or imprisonment of any person or the seizure, garnishment, attachment, or sale of any property or wages of any person unless such action is lawful and the debt collector or creditor intends to take such action.

(5) The threat to take any action that cannot legally be taken or that is not intended to be taken.



1 representation does not violate these sections if the debt collector a) can legally take  
2 the action and b) intends to do so. *Id.*

3 Statements like those made by Automated Accounts in this case do not, as a  
4 matter of law, constitute violations of the FDCPA. A debt collector may legally seek  
5 such remedies as garnishment, seizure, or attachment of property to collect a debt.  
6  
7 *See, e.g., Shuler v. Ingram & Associates, et al.*, 710 F. Supp. 2d 1213, 1224-25 (N.D.  
8 Ala. 2010); *aff'd*, \_\_\_ F. Supp.3d \_\_\_, 2011 U.S. App. LEXIS 19897 (11<sup>th</sup> Cir. 2011)  
9 (granting summary judgment for defendant on plaintiff's FDCPA claims). In *Shuler*,  
10 defendant Ingram & Associates ("Ingram") made motion for summary judgment. For  
11 purposes of that motion, the court accepted as true the plaintiff's allegation that  
12 Ingram told plaintiff, "if we go forward, there will be a lien on your property and we  
13 will garnish your wages, 25% of disposable income." *Shuler*, 710 F. Supp. 2d at  
14 1218-19. The court found that Ingram was legally entitled to take those actions even  
15 though it never filed a lawsuit against plaintiff. The court explained:

16 ...Ingram, as a debt collection law firm, is legally entitled to seek the seizure,  
17 garnishment, or attachment of the property or wages of Roger Shuler to collect  
18 on the American Express debt. The statements that Ingram may place a lien on  
19

20 ...

21  
22 (10) The use of any false representation or deceptive means to collect or attempt to collect any debt or to  
23 obtain information concerning a consumer.  
24

25 15 U.S.C. § 1692e.

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PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT  
PAGE 8

THOMAS MILBY SMITH, INC., P.S.  
ATTORNEY AT LAW  
P.O. Box 1360  
Spokane, WA 99210  
(509) 327-9902  
Fax: (509) 327-6238



1 plaintiffs' property, garnish Shuler's wages, that Ingram prosecutes debts like  
 2 his, and always wins since the debt is owed, (doc. 61 at 7-10), do not constitute  
 3 threats or actions that Ingram could not or did not intend to take. Rather, the  
 statements placed plaintiffs on notice of options legally available to Ingram.

4 *Shuler*, 710 F. Supp. 2d at 1224-25 (footnote omitted).<sup>8</sup> Moreover, defendants fully  
 5 intended to begin the legal process as they stated. The fact that no lawsuit was filed  
 6 did not disprove Ingram's intent to take legal action. A debt collector's statement  
 7 that it intends to take legal action can establish a reasonable likelihood that it intends  
 8 to do so.  
 9

10 Finally, plaintiffs miss the mark when they contend that Ingram's failure to file  
 11 a lawsuit establishes that it never intended to file a lawsuit and therefore  
 12 violated §§ 1692e(4) and (5). There is no provision in § 1692e that states that  
 13 filing a lawsuit is the *only* way for a debt collector to establish that it actually  
 14 intended to file a lawsuit. To the contrary, because Ingram is a law firm  
 15 specializing in collections,...a reasonable likelihood existed that Ingram would  
 16 indeed sue to collect the debt when it so stated to plaintiffs. That Ingram (or  
 17 more likely, American Express) has not yet elected, or may have decided not,  
 18 to sue does not create a material dispute. Ingram's actions here are not akin to  
 19 those in *Jeter* in which the creditor represented that it would sue in five days if  
 20 the plaintiff failed to respond. 760 F.2d at 1175-76. Moreover, unlike *Jeter*,  
 21 plaintiffs here have not presented any evidence showing that Ingram never sues  
 debtors or sues only in extremely rare situations -- both of which factored in  
 the *Jeter* court's decision. *Id.* at 1176-77. Plaintiffs' failure to present this type  
 of evidence is not surprising since Ingram is, after all, a collection law firm.  
 Since NCO transferred Shuler's account to Ingram after it could not collect, a  
 reasonable likelihood existed that Ingram indeed intended to sue at the time it

22 <sup>8</sup> The fact that Ingram is a debt collection law firm and Automated Accounts is not does not meaningfully distinguish  
 23 *Shuler* from this case. Both are debt collectors under the FDCPA, and like any debt collector, Automated Accounts can,  
 24 and sometimes does, initiate legal action to collect debts. It began that process in this case, when Ms. Bull sought client  
 records and obtained an assignment.

made the statements at issue. Accordingly, summary judgment is warranted on plaintiffs' §§ 1692e(4) and (5) claims.

*Shuler*, 710 F. Supp. 2d at 1225.

Plaintiff makes much of the fact that no judgment existed at the time of Ms. Braham's November 2009 conversation with Ms. Bull. That is irrelevant unless the debt collector threatens imminent legal action. *Shuler*, 710 F. Supp. 2d at 1225. For instance, *Shuler* distinguishes itself from a case in which a creditor threatened to sue the plaintiff within five days:

That Ingram (or more likely, American Express) has not yet elected, or may have decided not, to sue does not create a material dispute. Ingram's actions here are not akin to those in *Jeter* in which the creditor represented that it would sue in five days if the plaintiff failed to respond.).

*Id.* Indeed, plaintiff's own authority concedes that the imminence of a garnishment threat is what makes it an "action that cannot legally be taken" and therefore a FDCPA violation.

It is undisputed that Defendant sent a letter to Plaintiffs on March 20 threatening to garnish their wages. It is further undisputed that Defendant did not have a judgment or other legal justification by which to do this. This statement therefore violated the FDCPA by threatening action which cannot legally be taken. 15 U.S.C. § 1692e(4)-(5). *Though garnishment of wages is certainly legal, it is important to note that Defendant did not threaten garnishment at some unknown future date, but rather, after ten days. Doc. 18-5. Since Defendant did not have a judgment at that time and could not have reasonably obtained one within ten days, this was action that could not legally be taken.*

1 *Terry v. C & D Complete Business Solutions*, Case No. 09-00799-CV-W-DGK, 2011  
 2 U.S. Dist. LEXIS 4372, 18 (W.D. Mo. 2011) (emphasis added).<sup>9</sup>

3 Automated Accounts told Ms. Braham it would start the “legal process” and, in  
 4 answer to Ms. Braham’s question, truthfully stated this could include garnishment.  
 5 Defendants specified no time within which garnishment would occur, nor did they  
 6 state or imply garnishment was imminent. As in *Shuler*, defendants described lawful  
 7 actions they can, and sometimes do, take to collect debts. Defendants then began the  
 8 process of legal action by seeking client records and obtaining an assignment.<sup>10</sup> The  
 9  
 10

11  
 12 <sup>9</sup> The other authorities plaintiff cites on this point also assume imminent threats. The quoted portion of *Nance v.*  
 13 *Friedman*, 2000 U.S. Dist. LEXIS 16897, 2000 WL 1700156 (N.D. Ill. Nov. 8, 2000), notes that the letters at issue in  
 14 that case “do not just say he was authorized to sue; they indicate that a suit is imminent.” *Sowers v. Wakefield &*  
 15 *Associates*, 2010 U.S. Dist. LEXIS 103843 (D. Colo. 2010), quotes *Nance* in support of its holding. While *Sowers* does  
 16 not specifically rest its own decision on the imminence of the threat, neither does it rest on the existence of a  
 17 judgment—rather, it denies summary judgment for lack of evidence of “whether the defendant owned this debt; whether  
 18 the assignment of the debt included authority to bring a suit; or whether the defendant had any actual intention to bring a  
 19 suit to collect the remaining balance of the indebtedness.” *Sowers v. Wakefield & Associates*, 2010 U.S. Dist. LEXIS  
 20 103843, 12. It further notes the lack of “an existing judgment *or other legal authority*,” indicating that the absence of a  
 21 judgment is not dispositive. *Id* (emphasis added). This case is distinct from *Nance* and *Sowers*. There was no threat of  
 22 imminent garnishment, and there is evidence of both defendants’ intent to begin legal proceedings and, similar to  
 23 *Shuler*, its authority to do so.

24 <sup>10</sup> The facts that defendants sometimes did take legal action and, in this case, started the legal process as they said they  
 25 would (by obtaining an assignment), answers plaintiff’s lengthy argument about the “literal truth” of defendants’  
 statements. See *Plaintiff’s Memorandum*, pp. 14-18. Plaintiff cites authority from other circuits holding that even a

evidence shows that Ms. Bull began the process of taking legal action by obtaining an assignment from the client. Ms. Braham fails to provide any evidence whatsoever that demonstrates otherwise. Defendants' reference to beginning the "legal process" thus constituted a reference to an action, lawful in Washington,<sup>11</sup> that defendants intended to take.

Defendants stated they would pursue legal action against the plaintiff and began the process of doing so. As established by *Shuler* and *Terry*, their statements to Ms. Braham were accurate and not misleading as a matter of law.

**C. Defendants' Statements Were Not Subject to More Than One Reasonable Interpretation.**

Defendants' statements were not, as plaintiff argues, subject to more than one reasonable interpretation. *See Plaintiff's Memorandum, pp. 6-7, 16-17.* Ms. Braham's interpretation of Ms. Bull's alleged words, however, is not reasonable. Ms. Bull did not state garnishment would occur immediately. Rather, as both parties testify, Ms. Bull said she intended to begin the "process" of taking legal action. *Bull*

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threat that a debt collector "could" take action might mislead a consumer if the debt collector seldom took the action or had no intention of taking it. Neither is true here. Automated Accounts sometimes takes legal action and actually began that process here.

<sup>11</sup> See generally RCW Chapter 6.27.

1 *Dep.*, 78:6-14, 81:7-21, 101:21-102:4. Moreover, Ms. Braham's husband tried to  
2 reassure her garnishment could not happen immediately or automatically. *Ruiz Decl.*

3 Ms. Braham's alternate interpretation of Ms. Bull's statements is not  
4 reasonable on these facts. Ms. Braham fails to provides any evidence to dispute the  
5 fact that Ms. Bull's statements involved lawful actions that defendants intended to—  
6 and did—take. The fact that no garnishment ultimately occurred does not make Ms.  
7 Bull's alleged statements untrue. *See Shuler*, 710 F. Supp. 2d at 1225. Ms. Braham  
8 is not entitled to summary judgment on her claim under FDCPA section 1692e. To  
9 the contrary, summary judgment for defendants is proper.  
10  
11

#### 12 IV. CONCLUSION

13 Defendants did not violate the FDCPA. Defendants' statements to Ms. Braham  
14 described actions defendants a) could lawfully take and b) intended to take.  
15 Defendants' statements were true, accurate, and unlikely to mislead the reasonable,  
16 least sophisticated consumer. The Court should deny plaintiff's motion for summary  
17 judgment. Instead, it should grant summary judgment for defendants on plaintiff's  
18 claims.  
19  
20

21 RESPECTFULLY SUBMITTED this 20th day of January, 2012.

22 Respectfully submitted,

23 s/Thomas M. Smith

24 Thomas M. Smith, WSBA #0687

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of January 2012, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

Kirk D. Miller: kmiller@millerlawspokane.com

and I hereby certify that I have mailed by United States Postal Service the document to the following non-CM\ECF participant: n/a

/s/ Thomas M. Smith